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IN THE

Supreme Court of the United States

October Term, 1968
No. 751

CANNERY WORKERS UNION OF THE PACIFIC, affiliated with the SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Cannery Workers Union of the Pacific, affiliated with the Seafarers International Union of North America, AFL-CIO, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case, granting enforcement of an order issued against your Petitioner by the Respondent National Labor Relations Board, hereinafter referred to for convenience as "the Board."

Opinions Below.

The *per curiam* opinion of the Court of Appeals rendered on June 24, 1968 (Appendix B, *infra*), while not officially reported, is unofficially reported at 68

LRRM 2736. The decision and order of the National Labor Relations Board issued on June 21, 1966, (Appendix D, *Infra*) is reported at 159 N.L.R.B. 843.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 22, 1968 (Appendix C, *infra*). On September 5, 1968, the Court of Appeals issued its order recalling said judgment and staying the issuance thereof for a period of 60 days pending the application of your Petitioner for a writ of certiorari. On October 30, 1968 the Court of Appeals, per United States Circuit Judge Hamley, further stayed the issuance of its mandate in this case, under Rule 41 of the Federal Rules of Appellate Procedure, pending the filing, consideration and disposition by this Supreme Court of the within petition for a writ of certiorari, provided that the same has been filed on or before November 19, 1968. The jurisdiction of this Court to review this case by writ of certiorari is invoked under 28 U.S.C §1254(1).

Questions Presented.

1. Whether a labor union may lawfully expel a disloyal member for improperly attempting to set aside its valid existing collective bargaining contracts and disrupt its established bargaining relationships with various employers by filing sham and frivolous "refusal to bargain" and "company assistance" charges with the National Labor Relations Board in bad faith?

2. Whether the right of a labor union to adopt and enforce its own reasonable rules for self-regulation of its legitimate internal affairs, which is broadly recognized by applicable federal statutes (29 U.S.C. §§158 (b) (1) (A) and 411(a) (2)), may lawfully be exercised to duly expel a disloyal member for conduct undermining the union's effectiveness as a collective bargaining representative which consists in part of filing sham and frivolous unfair labor practice charges in bad faith, where such unfair labor practice charges and such expulsion from union membership are both wholly unrelated to his job status and employee rights under Section 7 of the National Labor Relations Act, as amended (61 Stat. 140, 29 U.S.C. §157)?

3. Whether a union member's right of unimpeded access to the processes of the National Labor Relations Board with respect to matters purportedly in the public domain covered by the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151, *et seq.*), absolutely requires a labor union to keep an active opponent within its ranks whenever he has filed groundless unfair labor practice charges under any subsection or subsections of Section 8 of the Act, even though a hostile union member may be suspended or expelled lawfully for filing a decertification petition under Section 9 of the Act (29 U.S.C. §159)?

Statutory Provisions Involved.

The statutory provisions involved in this case are:

The National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151, *et seq.*), hereinafter referred to for convenience as "the Act"—

Section 7 (29 U.S.C. §157)

Section 8(a)(1) (29 U.S.C. §158(a)(1))

Section 8(a)(2) (29 U.S.C. §158(a)(2))

Section 8(a)(5) (29 U.S.C. §158(a)(5))

Section 8(b)(1)(A) (29 U.S.C. §158(b)(1)(A))

Section 8(b)(3) (29 U.S.C. §158(b)(3))

Section 9(c)(1)(A)(ii) (29 U.S.C. §159(c)(1)(A)(ii))

Section 10(e) (29 U.S.C. §160(e))

Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 522, 29 U.S.C. §411(a)(2)), hereinafter referred to for convenience as "Section 101(a)(2), LMRDA."

The pertinent text of the foregoing statutory provisions is printed verbatim in Appendix A, *infra.*

Statement.

A. The Board Proceedings.

In this case, all parties waived a hearing before a trial examiner of the Board and the matter was decided by the National Labor Relations Board upon an agreed-upon record consisting of:

(a) An 8(b)(1)(A) unfair labor practice charge filed against your Petitioner, hereinafter referred to for convenience as "the Union", on August 30, 1962 by its expelled former member, Thomas E. Ivey, herein-

after referred to for convenience as "Ivey" in Board Case No. 21-CB-1942;

(b) The complaint issued on behalf of the Board based upon said 8(b)(1)(A) charge on November 13, 1964;

(c) The Union's answer to such complaint received by the Board on November 18, 1964;

(d) The Union's constitution and by-laws received in evidence by stipulation as General Counsel's Exhibit No. 2(d);

(e) An all-party stipulation of facts executed January 29, 1965;

(f) Ivey's 8(b)(3) charge against the Union in Board Case No. 21-CB-1854 filed on April 4, 1962;

(g) Ivey's 8(a)(1), 8(a)(2), and 8(a)(5) charge filed against Van Camp Sea Food Co., Inc., hereinafter referred to for convenience as "Van Camp", and five other named employers in Board Case No. 21-CA-4758;

(h) The Regional Director's dismissal letter in Board Case Nos. 21-CB-1854 and 21-CA-4758, refusing to issue a complaint, dated April 23, 1962.

[R. 3-75. References designated "R" are to Volume I of the original record as certified and reproduced by the Board for the Court of Appeals].

The Union agrees with the Board that no evidentiary issues were presented in the agency proceedings [R. 80]. The Board's factual findings [R. 81-82] are thus not in dispute, as distinguished from its conclusions [R. 82-89] and order [R. 89-92] which were vigorously contested by the Union before the Court of Appeals [see Union's Answer to Petition for Enforcement, R. 96-98].

1. *The Undisputed Facts.*

On April 4, 1962, Ivey, a long-time member of the Union employed within its bargaining unit of fish packing employees by Van Camp, an employer under the Board's jurisdiction, filed unfair labor practice charges with the Board against the Union and six employers party to a recently-concluded collective bargaining agreement with the Union, including Van Camp. Ivey's original charges alleged in substance that by entering into such new collective bargaining agreement, the Union had committed a "refusal to bargain" in violation of Section 8(b)(3) of the Act and the named employers had committed "unlawful interference, restraint and coercion", "company assistance" and a "refusal to bargain" in violation of Sections 8(a)(1), (3) and (5) of the Act [R. 3-6; 10-11; 13; 14; 67; 75; 81).

On April 23, 1962, the Board's Regional Director in Los Angeles refused to issue a complaint based upon Ivey's original charges which disclosed their obvious lack of merit on their face. In the absence of any timely appeal by Ivey to the Board's General Counsel in Washington, D.C., the dismissal of his charges attacking a good faith modification by mutual agreement among the parties of the former collective bargaining agreement prior to the termination date, without the necessity of resorting to a strike or lockout, became final [R. 67; 81].

On June 12, 1962, Ivey's fellow union members filed written specific charges against him within the Union which were duly served upon him together with a notice of hearing affording him adequate time to prepare his defense [R. 69-70; 81-82]. After affording him a full and fair hearing on August 16, 1962, in

accordance with the Union's Constitution and by-laws [R. 70-72; 81-82], at which hearing Ivey refused to appear and declined to offer any defense on his own behalf, the elected members of the trial committee found Ivey guilty of three alleged offenses for which they recommended the penalty of expulsion and acquitted him of a fourth alleged offense for lack of evidence [R. 74; 82]. On August 27, 1962, Ivey was duly expelled by a membership vote at a regular union meeting based upon ratification of the findings and recommendation of the elected trial committee [R. 75; 82].

The specific offenses of which Ivey was convicted by the elected trial committee were violations of the provisions of the Union's constitution and by-laws proscribing "conduct which is inconsistent with the responsibility of every loyal member toward the Union as an institution or which would interfere with the performance by the Union of its legal or contractual obligations" [General Counsel's Ex. 2(d), Art. III, Sec. 17(d), p. 14 and Art. IX, Sec. 2(b)(2), p. 40] by having "made an improper attempt to set aside a collective bargaining contract of the Union" and having "interfered with and disrupted the established collective bargaining relationships between the Cannery Workers Union and the Cannery Employers," in addition to filing the groundless "refusal to bargain" charge against the Union in Board case No. 21-CB-1854 in bad faith without having first invoked and exhausted his internal union remedies to the extent that waiver of such exhaustion of remedies requirement is not required by law [*Ibid.*, Art. XI, Sec. 2, p. 48]. No monetary penalty or impairment or threatened impairment of Ivey's employment status, job opportunities, or right

to fair union representation as a bargaining unit employee was imposed upon or sustained by him as a consequence of his filing of any unfair labor practice charges, by reason of his expulsion from membership or otherwise [R. 75; 82].

2. The Board Decision.

On August 30, 1962, Ivey filed his charge against the Union in Board Case No. 21-CB-1942 alleging that the Union restrained and coerced employees in the exercise of the rights guaranteed by Section 7 of the Act by his expulsion from union membership [R. 9; 80].

With only the stipulated record before it, the Board concluded that the Union violated Section 8(b)(1)(A) of the Act by expelling Ivey from membership for filing unfair labor practice charges, under the doctrine of its *Skura* decision, 148 N.L.R.B. 679 [R. 82-89]. In addition to ordering the Union to reinstate Ivey to membership upon request, the Board directed that he be "reimbursed with 6% interest thereon" for any expenses or losses suffered because of the absence of any health and welfare and similar "fringe benefits" accruing to union members during the period of Ivey's expulsion, even though the record herein is devoid of any evidence that there were any such welfare benefits accruing to union members as such during the period in question. The Board's order also directed the Union to cease and desist from expelling from union membership or otherwas disciplining employees for filing any sort of unfair labor practice charges with the Board or for failing to exhaust their internal union remedies prior to filing such charges or for otherwise participating or co-

operating in Board proceedings, and to post the customary notices [R. 89-92].

B. The Decision of the Court of Appeals.

In this case, the Court of Appeals for the Ninth Circuit heard oral argument of opposing counsel, after the case had been fully briefed, on December 8, 1967. By its order filed on December 12, 1967, the Court of Appeals withheld submission of this case pending final disposition by this Supreme Court of its Dkt. No. 796, Oct. Term, 1967 (*N.L.R.B. v. Shipbuilding Workers,* 391 U.S. 418).

Following the decision of the *Shipbuilding Workers* case on May 27, 1968, the Court of Appeals for the Ninth Circuit, without restoring the instant case to its calendar for reargument, rendered its one sentence *per curiam* opinion herein, granting enforcement of the Board's order solely on the authority of the *Shipbuilding Workers* decision.

The *per curiam* opinion of the Court of Appeals, consisting of a single sentence and the citation of a single case, wholly fails to cite, discuss, or distinguish the Board decision in the *Tawas Tube* case, 151 N.L.R.B. 46 and the Ninth Circuit's own decision in *Price v. N.L.R.B.,* (C.A. 9th, 1967) 373 F. 2d 443, cert. den. 392 U.S. 905, aff'g *United Steelworkers of America,* 154 N.L.R.B. 692. It contains no reference to nor discussion of Section 102, LMRDA insofar as that statutory provision recognizes the right of a labor union to defend itself by adopting and enforcing reasonable rules as to a member's responsibility toward the organization as an institution and his duty to refrain from conduct that would interfere with its performance of

its legal or contractual obligation. It neither mentions with approval or disapproval the broad distinction drawn by the Board in the instant case between union discipline involving respectively a charge under Section 8 of the Act and a petition filed under Section 9 of the Act, while declaring that both are equally "within the public domain" (*Cannery Workers Union of the Pacific,* 159 N.L.R.B. 843, 849-850). It approves *sub silentio* the extension of the doctrine supporting the overriding public interest in maintaining unimpeded access to the Board for a union member, who brings an unfair labor practice charge involving his personal rights, to the undisputed facts of the present case in which Ivey's original charges disclose on their face that they were filed in bad faith; did not involve any of his Section 7 rights; and amounted to a deliberate abuse of the Board's processes. It altogether ignores the issue raised by the Union in its briefs before the Board and the Court of Appeals, as well as upon oral argument before the Court of Appeals, as to whether Section 8-(b)(1)(A) of the Act authorizes the Board to require a union to retain a disloyal member in its ranks when he is actively seeking to undermine its contracts and disrupt its bargaining relationships with particular employers, contrary to the wishes and best interests of the overwhelming majority of the entire union membership.

REASONS FOR GRANTING THE WRIT.

1. The Court Below Misconstrued and Misapplied the Opinion of This Supreme Court in the Shipbuilding Workers Case.

In its one sentence *per curiam* opinion in this case, the Court of Appeals for the Ninth Circuit granted enforcement of the Board order under review without discussion, relying solely "on the authority of *National Labor Relations Board v. Industrial Union of Marine and Shipbuilding Workers of America,* . . . decided May 27, 1968." (391 U.S. 418, 88 S. Ct. 1717, 20 L. Ed. 2d 706).

The court below thus by-passed the *"threshold question"* required to be answered under the doctrine of the *Shipbuilding Workers* case before reaching the main issue as to whether Ivey could be expelled lawfully by the Union for filing his original charges at the Board without first having exhausted his internal union remedies as required by the union constitution and by-laws, among other specified grounds for such disciplinary action. Such "threshold question" was as follows:

> Whether Ivey's original charges adequately alleged an impairment of his rights as an employee guaranteed in Section 7 of the Act so as to bring his exercise of the right to file such charges with the Board under the protection of Section 8(b)(1)-(A) of the Act against union restraint or coercion?

In *Shipbuilding Workers,* both the record [Dkt. No. 796, Oct. Term, 1967, R. 3, 5, 16 and 28] and the opinion of this Court (Footnote 2; 20 L. Ed. 2d at pp.

709-711) reflect that Holder's original charge to the Board which preceded his expulsion from union membership allege that the respondent local union had violated Sections 8(b)(1)(A) and 8(b)(2) of the Act by causing Holder's employer to discriminate against him because he had engaged in concerted activities with respect to the conditions of his employment. In disposing of the "threshold question" there Holder's initial charge complaining of union-inspired job discrimination, was found by this Court to contain sufficient allegations of impairment of his individual rights as an employee to plainly fall within the ambit of Section 7 of the Act.

In holding that the Board properly entertained the complaint of Holder against his expulsion by the respondent unions and that its order in the *Shipbuilding Workers* case (159 N.L.R.B. 1065) should be enforced, this Court did not proclaim an absolute right of access to the Board for union members in all situations. The opinion merely gave judicial approval to "the philosophy of the Board in the *Skura* case" (*Local 138, International Union of Operating Engineers,* 148 N.L.R.B. 679). *Skura* is the leading case in a line of Board decisions in which unions have been precluded under Section 8(b)(1)(A) of the Act from imposing discipline against a union member, under circumstances reaching beyond the legitimate interest of a labor organization in self-regulation of its internal affairs, *i.e.,* fining, suspending or expelling a union member for filing or instigating §8(b)(1)(A) and §8(b)(2) charges plainly alleging prohibited union interference with a worker's employment status or job opportunities. (See *Supplemental Memorandum of the N.L.R.B. to the Sub-*

committee on the Separation of Powers, Senate Judiciary Committee, 90th Cong. 2d Sess., 69 LRR 157, 181, 183 citing this Supreme Court's decision in *Shipbuilding Workers;* the leading Board decision in *Skura, supra;* and *H.B. Roberts and Local 925, Operating Engineers,* 148 N.L.R.B. 675, enf'd *sub nom. Roberts v. N.L.R.B.,* D.C. Cir., 1967, 350 F. 2d 427. Also, see *Philadelphia Moving Picture Machine Operators,* 159 N.L.R.B. No. 124, enf'd *sub nom. Philadelphia Moving Picture Machine Operators Union v. N.L.R.B.,* C.A. 3rd, 1967, 382 F. 2d 598.)

If the Court of Appeals for the Ninth Circuit had compared the undisputed facts disclosed by the stipulated record in the instant case with the concrete factual situation before this Court in the *Shipbuilding Workers* case, it would neessarily have found that the two cases are definitely distinguishable. Ivey's original charges, which were part of the stipulated record before the Board and the Court of Appeals in this case [R. 3, 5, 67, 75, 81], in substance alleged that the Union refused to bargain in violation of §8(b)(3) of the Act and the six fish packing employers named in the charges refused to bargain in violation of §8(a)(5), assisted the Union in violation of §8(a)(2), and committed a derivative violation of §8(a)(1) of the Act by mutually agreeing upon a proposed modification of their existing contract before its expiration date through collective bargaining for new wages, hours and other terms and conditions of employment. Ivey's initial charges filed with the Board preceding his expulsion were utterly devoid of any claim or assertion, either directly or by implication, that he had suffered any union-inspired job discrimination or sustained any other form of im-

pairment of his statutory rights as an employee within the ambit of Section 7 of the Act.

These patently groundless charges, submitted by Ivey to the Board as an intra-union propaganda ploy just before an imminent election of union officers, were sham and frivolous on their face and in no sense could properly be said to touch a part of the public domain beyond the internal affairs of the Union. Ivey's specious charge in no way could be said to involve the overriding public interest in maintaining unimpeded access to the Board for a union member who honestly brings his charge of union-inspired job discrimination in good faith, albeit mistakenly, in a *Skura*-type case.

By summarily transposing the general expressions of this Court in its *Shipbuilding Workers* opinion, regarding a union's lack of legal power to penalize one of its members for seeking the aid of the Board without exhausting his internal union remedies, to the undisputed circumstances of this case where none of Ivey's §7 rights were even alleged to have been impaired in his original unfair labor practice charges, the Court of Appeals for the Ninth Circuit ignored the significant admonition given in *Armour & Co. v. Wantock,* 323 U.S. 126, 132-133. There, Mr. Justice Jackson, speaking for this Court, issued a firm reminder that, in construing and applying its opinions interpreting a federal labor statute, "words of our opinions are to be read in the light of the facts of the case under discussion" and "have no necessary application to other states of facts."

The court below misconstrued and misapplied the authority of this Court's opinion in the *Shipbuilding Workers* case by extending it to cover Ivey's bad faith

filing of sham and frivolous charges with the Board for the purpose of harassing the Union and disrupting its established collective bargaining relationships with the six employers signatory to the newly-negotiated union contract. The freedom of union members to invoke the protection of the Act in good faith and ask the Board for a redress of their bona fide complaints or grievances as an incident of their status and statutory rights as employees cannot thus be stretched to include a deliberate abuse of the Board's processes by a disloyal union member for the hostile purpose of attacking his own union's position as bargaining agent and undermining its collective bargaining policies without any justification for so doing (See Sommers, *Legal Limitations on Union Discipline,* 64 Harv. L. Rev. 1049, 1068 (1951) cited in footnote 6 of the *Shipbuilding Workers* opinion, 20 L. Ed. 2d at p. 712; *Philadelphia Moving Picture Machine Operators Union, supra,* 382 F. 2d 598, footnote 1; *Roberts v. N.L.R.B., supra,* 359 F. 2d 427, 450).

2. The Important Questions Presented Herein Should Be Settled by This Court to Resolve the Existing Conflict of Decisions Within the Ninth Circuit and Within the Board as to Union Discipline Imposed Against Charging Parties and Decertification Petitioners for Hostile Attacks Upon Their Labor Organization as an Institution.

The instant decision of the Court of Appeals for the Ninth Circuit, rendered *per curiam* by Circuit Judges Hamley and Merrill and District Judge Real of the Central District of California, sitting by designation, conflicts at least in principle with the opinion by Circuit

Judge Duniway setting forth the decision in *Price v. N.L.R.B.*, (C.A. 9th, 1967), 373 F. 2d 443, cert. den. 392 U.S. 905.

The Board decision involved in this case (*Cannery Workers Union of the Pacific,* 159 N.L.R.B. 843) likewise conflicts at least in principle with the Board decisions in *Tawas Tube Products, Inc.,* 151 N.L.R.B. 46 and *United Steelworkers of America,* 154 N.L.R.B. 692, the latter decision being affirmed by the Ninth Circuit in the *Price* case, *supra.*

The *Price* and *Tawas Tube* cases hold that a union does *not* violate Section 8(b)(1)(A) of the Act when it expels or suspends a member for filing a decertification petition with the Board pursuant to the provisions of Section 9(c)(1)(A)(ii). In the Board's view, expressed in these cases, which has been judicially approved by the Court of Appeals for the Ninth Circuit, Congress did not intend to require unions to retain in membership hostile employees who attack the union's existence as an institution, as evidenced by the proviso to Section 8(b)(1)(A) of the Act exempting from its strictures "the right of a labor organization to prescribe its own rules with respect to the acquistition or retention of membership therein" and the proviso to Section 101(a)(2), LRMDA similarly immunizing from impairment "the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations." (See the *Supplemental Memorandum of the N.L.R.B. to the Subcommittee on the Separation of*

Powers, Senate Judiciary Committee, 90th Cong., 2d Sess., 69 LRR 157, 182-183).

In the instant case, Ivey was duly expelled for violating provisions of the Union's constitution and by-laws proscribing improper conduct by any member "which is inconsistent with the responsibility of every loyal member toward the Union as an institution or which would interfere with the performance by the Union of its legal or contractual obligations" [General Counsel Ex. 2(d), Art. III, Sec. 17(d), p. 14 and Art. IX, Sec. 2(b)(2), p. 40]. The specific misconduct constituting such violations which established his guilt, accordng to the fndings of the Union's elected trial committee were Ivey's "Improper attempt to set aside a legal collective bargaining contract of the union" and "interfering with and disrupting the established collective bargaining relationships between the Union and the Cannery Employers" through the filing of sham and frivolous "charges" with the Board, which "charges" attacked the Union's position as bargaining agent, rather than asserting any individual rights granted to Ivey as an employee by law and were dismissed by the Board's Regional Director without any appeal on his part to the Board's General Counsel in Washington, D.C.

Counsel for the Union argued in a written brief to the Board and in his brief and oral argument to the Court of Appeals in this case that the grounds for Ivey's expulsion plainly related to "a matter of legitimate union concern" under the circumstances found in this case. The Union was therefore entitled to defend itself from such an attack upon its position as a bargaining agent and attempt to undermine its strength in

collective bargaining by refusing to retain an active opponent engaging in such hostile action within the ranks of the Union's adherents so long as his job rights were not impaired, under the authority of the *Tawas Tube* and *Price* cases and the proviso to Section 102(a)(2), LMRDA.

The Board's decision herein arbitrarily determined that there was "no basis for applying the *Tawas Tube* rationale to the facts of the instant case", thereby drawing an artificial distinction between union discipline following a charge filed under any of the different subsections of Section 8 of the Act and union discipline following a decertification petition filed under Section 9 of the Act. The unreasonableness of this distinction is emphasized by the Board's declaration at the same time that "proceedings under Section 9 of the Act are no less within the public domain." (159 N.L.R.B. at pp. 849-850). According to the Board, a legal attack by a hostile member against his union through the filing of sham and frivolous unfair labor practice charges aimed exclusively at beclouding existing union contracts and disrupting the union's bargaining agency is "a far more indirect attack than is a decertification petition" and "cannot be equated with the direct danger presented by a decertification petition". As a matter of policy, the Board has assumed the power to require a union to retain such a disloyal member within its ranks merely because he seeks to undermine its bargaining strength by filing Section 8 charges rather than by filing Section 9 decertification petitions.

The *per curiam* opinion of the Court of Appeals in the instant case neither cites nor discusses the *Tawas Tube* and *Price* cases and the proviso to Section 102(a)

(2), LMRDA, preserving the right of a union to discipline members who engage in acts of disloyalty toward the organization as an institution. The lower court's opinion neither alludes to nor expressly rules upon the arguments advanced to it by counsel for the Union based upon these authorities.

Although the Solicitor General on behalf of the Board initially advised this Supreme Court that there was "a close relationship between the issue" in the *Shipbuilding Workers* case and in *Price* (Pet. for a Writ of Certiorari, Dkt. No. 796, Oct. Term, 1967, p. 10), he subsequently took the position that it was unnecessary to consider the merits of the Board's approach to the question presented in *Price* when deciding the *Shipbuilding Workers* case, after noting that in the instant *Cannery Workers Union* decision the Board attempted to explain why it regards decertification cases like *Tawas Tube* and *Price* as materially different from "*Skura*-type cases" (Board Brief, Dkt. No. 796, Oct. Term, 1967, p. 27, footnote 29).

The Solicitor General also observed on behalf of the Board in *Shipbuilding Workers* that "The question whether a union rule or policy is within or without the area of legitimate union concern, although relatively easy to answer in the situation presented in *Allis-Chalmers* . . . [*N.L.R.B. v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175] and in the situation here, becomes more difficult in other situations." (*Ibid., loc. cit. supra*).

Although a brief on behalf of *Price* as *amicus curiae* was filed with the written consent of all parties in the *Shipbuilding Workers* case, neither the opinion of the Court per Mr. Justice Douglas nor the concurring opin-

ion of Mr. Justice Harlan cites or discusses the closely related issue in the *Price* case. Shortly after the *Shipbuilding Workers* decision (391 U.S. 418) was handed down on May 27, 1968, certiorari was denied in the *Price* case on June 10, 1968 (392 U.S. 905).

Since the *Shipbuilding Workers* decision, upon which the terse opinion of the court below in the instant case was completely based, made no attempt to reconcile the principles enunciated there and the conflicting line of cases represented by *Tawas Tube* and *Price,* it is submitted that certiorari should be granted in the instant case to resolve the conflict of authorities on a matter of great importance in the administration of Section 8(b)(1)(A) of the Act (*New York v. Saper,* 336 U.S. 328, 329).

3. The Questions Presented Herein Are of Great Importance in the Administration of Section 8(b)(1)(A) of the National Labor Relations Act, as Amended.

The questions presented by this petition for a writ of certiorari, involving the lawfulness under Section 8-(b)(1)(A) of the Act of union discipline aimed at defending a labor organization's existing contracts and collective bargaining relationships from the harassing attempts of a disloyal member to undermine its bargaining strength through the filing of sham and frivolous unfair labor practice charges under various subsections of Section 8 of the Act, not involving claims of union-inspired job discrimination under §8(b)(2), manifestly involves "an important phase of the administration of the National Labor Relations Act" involving issues of substantial public importance which war-

rant the granting of certiorari in this case (*N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 499, 502; *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 149).

The Ninth Circuit's *per curiam* opinion in this case merely cites as controlling authority this Court's recent decision in the *Shipbuilding Workers* case. The court below does not discuss or indicate where the state of facts before it falls under the division made by *Shipbuilding Workers* between "the internal affairs of the union" and "a matter that it is the public domain" because the charge originally filed with the Board by the expelled member alleged that the union violated his rights as an employee under Section 7 of the Act. Likewise, the Ninth Circuit's *per curiam* opinion fails to discuss the difficult question as to whether the hostile actions of the union's disloyal member disclosed by the stipulated record here fall within or without "the legitimate area of union concern" recognized by the *Tawas Tube* and *Price* cases and Section 102(a)(2), LMRDA. Furthermore, that *per curiam* opinion does not discuss or expressly pass upon the artificial distinction drawn by the Board in this case between union discipline involving respectively a charge filed under any of the subsections of Section 8 of the Act and a decertification petition filed under Section 9 of the Act, while declaring that both are equally "within the public domain."

Only an authoritative opinion of this Supreme Court can settle these questions of exceptional importance in the administration of Section 8(b)(1)(A) of the Act and eliminate the existing uncertainties because of the conflicting authorities relating to such questions within the Ninth Circuit and within the Board.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT W. GILBERT,
LOUIS A. NISSEN,
By ROBERT W. GILBERT,
Counsel for Petitioner.

APPENDIX A.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * * *

REPRESENTATIVES AND ELECTIONS

Section 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees * * *

(ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * *

PREVENTION OF UNAIR LABOR PRACTICES

Sec. 10 * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceed-

ing and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * * *

The relevant provisions of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519, 29 U.S.C., Secs. 401, *et seq.*) are as follows:

TITLE I—BILL OF RIGHTS, OF MEMBERS OF LABOR ORGANIZATIONS

Sec. 101(a) * * *

(2) FREEDOM OF SPEECH AND ASSEMBLY.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

* * * *

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, *vs. Cannery Workers of the Pacific, affiliated with the Seafarers International Union of North America, AFL-CIO,* Respondent-No. 21,680.

Filed June 24, 1968.

On Petition for Enforcement of an Order of the National Labor Relations Board

Before: HAMLEY and MERRILL, Circuit Judges, and REAL* District Judge.

PER CURIAM:

The above-entitled petition for enforcement of the order of June 21, 1966, issued by the *National Labor Relations Board,* is granted on the authority of *National Labor Relations Board v. Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO,* and its Local 27, ... U.S. ....., decided May 27, 1968.

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*The Honorable Manuel Real, United States District Judge for the Central District of California, sitting by designation.

APPENDIX C.

Judgment.

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, v. Cannery Workers Union of the Pacific, affiliated with the Seafarers International Union of North America, AFL-CIO, Respondent. No. 21,680.

Before: HAMLEY and MERRILL, Circuit Judges, and REAL*, District Judge.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, Cannery Workers Union of the Pacific, affiliated with the Seafarers International Union of North America, AFL-CIO, its officers, agents, and representatives on June 21, 1966. The Court heard argument of respective counsel on December 8 1967, and has considered the briefs and transcript of record filed in this cause. On June 24, 1968, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Ninth Circuit that the Respondent, Cannery Workers Union of the Pacific, affiliated with the Seafarers International Union of

*The Honorable Manuel Real, United States District Judge for the Central District of California, sitting by designation.

North America, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Expelling employees from union membership, or otherwise disciplining them for filing unfair labor practice charges with the Board, or for failing to exhaust their internal union remedies prior to filing such charges with the Board, or otherwise participating or cooperating in Board proceedings.

(b) In any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act (hereinafter called the Act) as amended.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon application, offer to Thomas E. Ivey immediate and full reinstatement to membership in Respondent without prejudice to any rights and privileges to which he would have become entitled as of, and since August 27, 1962, the date of his expulsion from membership, and reimburse him, together with 6 percent interest per annum, for any losses or expenses suffered because of the absence of certain benefits during the period of his expulsion, in accordance with the Section of the Decision and Order entitled "The Remedy".

(b) Post at its business offices and meeting halls in Los Angeles, California, copies of the attached notice marked "Appendix". Copies of said notice, to be furnished by the Regional Director for Region 21, (Los Angeles, California) shall, after being duly signed by the Union's representative, be posted by the Union immediately upon receipt thereof, and be maintained by it

for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the aforesaid Regional Director, in writing, within 10 days from the date of this Judgment, what steps have been taken to comply herewith.

ENDORSED, JUDGMENT
FILED AND ENTERED
August 22, 1968
/s/ William B. Luck
William B. Luck
Clerk

/A TRUE COPY
ATTEST: August 22, 1968
William B. Luck
Clerk
By: William E. Wilson, Chief Deputy.

APPENDIX

NOTICE TO ALL MEMBERS OF THE CANNERY WORKERS UNION OF THE PACIFIC,

affiliated with the

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA AFL-CIO

PURSUANT TO A JUDGMENT

of the United States Court of Appeals, Enforcing an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT expel employees from membership in our organization, or take other disciplinary action against them, because they file unfair labor practice charges with the National Labor Relations Board, or otherwise participate or cooperate in the proceedings of the Board.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights under the National Labor Relations Act.

WE WILL offer to THOMAS E. IVEY, upon application, immediate and full reinstatement to membership in our organization without prejudice to any rights and privileges to which he may be entitled as of, and since, August 27, 1962, the date of his expulsion from membership, and reimburse him with 6 percent interest thereon, for

any losses or expenses suffered because of the absence of certain benefits during the period of his expulsion, in the manner required by a Decision and Order of the National Labor Relations Board.

CANNERY WORKERS UNION
OF THE PACIFIC,
affiliated with the SEAFARERS
INTERNATIONAL UNION OF
AMERICA, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 849 South Broadway, Los Angeles, Calif. 90014, Tel. No. 688-5204, if they have any question concerning this notice or compliance with its provisions.

APPENDIX D.

Decision and Order.

United States of America, Before the National Labor Relations Board.

Cannery Workers Union of the Pacific, affiliated with the Seafarers International Union of North America, AFL-CIO (Van Camp Sea Food Co., Inc.) and Thomas E. Ivey, An Individual. Case No. 21-CB-1942.

Upon charges duly filed by Thomas E. Ivey, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 21, issued a complaint against Respondent dated November 13, 1964. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served upon Respondent and the Charging Party. In substance the complaint alleged that the Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act, as amended, by expelling the Charging Party from membership because he had filed unfair labor practice charges with the Board.

On November 18, 1964, Respondent duly filed its answer admitting certain allegations of the complaint but denying the commission of any unfair labor practices.

On January 29, 1965, all parties to this proceeding moved to transfer the proceeding directly to the Board. The parties agreed that the charge, complaint and notice of hearing, answer, Respondent's constitution and by-laws, the stipulation of facts, and the charges and dismissal letter in Cases Nos. 21-CA-4759 and 21-CB-1854, constituted the entire record in the case and that no oral testimony was necessary or de-

sired by any of the parties. The parties further stipulated they waived a hearing before a Trial Examiner and the issuance of a Trial Examiner's Decision and Recommended Order, and desired to submit this case for findings of fact, conclusions of law, and order, directly to the Board.

On February 8, 1965, the Board granted the parties' request to transfer the case to the Board and to file briefs. Thereafter, the General Counsel, the Respondent, and the Seafarers International Union of North America, AFL-CIO, *amicus curiae,* filed briefs.[1]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

On the basis of the parties' stipulation and upon the entire record in this case, the Board makes the following:

Findings of Fact

I. *Jurisdiction*

Respondent Union represents in collective bargaining employees of Van Camp Sea Food Company, Inc. Van Camp is engaged in southern California in the business of packing fish and allied products. In the course and conduct of its business operations, Van Camp annually ships products valued in excess of $50,000 directly to customers located outside the State of California. We find that Van Camp is, and at all times material herein has been, an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[1]The requests of Respondent and *amicus curiae* for oral argument are denied, as the record herein, including the briefs, adequately presents the issues and positions of the parties.

II. *The labor organization involved*

Respondent is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. *The unfair labor practice*

Thomas Ivey, the Charging Party, joined Respondent Union in 1950. On or about April 4, 1962, while a member of the Union, Ivey filed unfair labor practice charges against it alleging a violation of Section 8(b)-(3) of the Act, and against Van Camp and five other employers in the Southern California packing industry alleging violations of Section 8(a)(1), (2), and (5) of the Act. In essence, the charges attacked a mutual consent modification, more than 60 days prior to the termination date, of the collective-bargaining agreement then in effect between Respondent and the employers, allegedly in violation of Section 8(d)(1) of the Act. The charges were dismissed by the Regional Director for Region 21 on April 23, 1962, and no appeal was taken.

On June 12, 1962, Ivey was charged by members of Respondent with violating certain provisions of Respondent's constitution and by-laws by filing the above-mentioned unfair labor practice charges without exhausting the internal remedies provided by Respondent's constitution, by interfering with and disrupting Respondent's established collective-bargaining relationship with the employers by filing the charges, and by making false, defamatory, and fraudulent statements concerning Respondent and its collective-bargaining activity. Thereafter, notice of the charges and a hearing was served upon Ivey. Ivey failed to appear at the scheduled hearing and was tried *in absentia,* in accord-

ance with Respondent's constitution. Respondent's trial committee found Ivey guilty of all charges except the last, and recommended his expulsion. At a subsequent meeting of Respondent's membership, the trial committee's recommendations were accepted, and Ivey was expelled. No fine was levied against Ivey, and he is and has been at all material times employed by Van Camp.

The General Counsel contends that this case is controlled by *Local 138, International Union of Operating Engineers, AFL-CIO, (Charles S. Skura),* 148 NLRB 679, in which the Board held that the respondent union there had violated Section 8(b)(1)(A) by fining Skura because he had failed to exhaust his internal union remedies prior to filing unfair labor practice charges against the union with the Board. Respondent and *amicus curiae* contend that the *Skura* case is not controlling on the facts herein and that Respondent did not violate the Act by expelling Ivey for filing charges with the Board.

We find, for the reasons stated below and those set forth in *Skura,* that Respondent violated Section 8(b)-(1)(A) by expelling Ivey from membership for filing unfair labor practice charges with the Board.

In *Skura,* a unanimous Board held:

> Just as an employer violates the Act by resorting to restraint and coercion to restrict the right of an employee to file a charge, so too, does a labor organization infringe the rights of employees under this law by resorting to unlawful means to prevent or restrict employees from filing charges. As such conduct by an employer violates Section 8-(a)(1), so does a labor organization's use of restraint or coercion violate Section 8(b)(1)(A).[2]

[2] *Skura, supra,* at 681-82.

The Board then stated that there could be "no doubt that a fine is by nature coercive . . .",[3] citing *Peerless Tool and Engineering Co.,* 111 NLRB 853, 857-858.

Similarly, we think there can be no doubt that expulsion from union membership is "by nature" coercive. First, the Board's language in *Peerless Tool, supra,* relied upon to support the finding of coercion in *Skura,* described both fines and expulsions as coercive.[4] Moreover, the Board already has indicated that a finding of coercion in this line of cases will not be limited to those instances where union members are fined. See, for example, *Local 1367, International Longshoremen's Association, AFL-CIO,* 148 NLRB 897, where the imposition of trusteeship by a district union over a constitutent local in retaliation for the local's charges against the district was found to constitute unlawful coercion under Section 8(b)(1)(A). Finally, the coercive nature of expulsion from membership was well summarized in the California case of *Mitchell v. International Association of Machinists,*[5] in which it was held that a union could not expel members

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[3]*Id.* at 682.

[4]In that case, the Board then noted that such actions were generally permissible under the proviso to Section 8(b)(1)(A) although they were in fact coercive. The effect of the proviso on the issues presented herein is discussed separately, *infra.* See also in this regard *International Typographical Union,* 86 NLRB 951, 956-57, affirmed as modified *sub. nom. American Newspapers Publishers Association v. N.L.R.B.,* 193 F.2d 782, 880-801 (C.A. 7).

[5]*Mitchell v. International Association of Machinists,* 16 Cal. Rept. 813, 815 (California District Court of Appeal, 2d District, 1961).

for campaigning for passage of a State "right-to-work" law which the union opposed. With respect to the coercive effects of expulsion, the court stated as follows:

> [I]t cannot be assumed that the only value in membership is job retention. Even though a member may keep his job when expelled, his expulsion causes him to suffer a detriment the apprehension of which would no doubt have a coercive effect on the membership. First, of all, it is not clear what his rights would be if he quit his job to seek another, at least in intrastate commerce. Also, he has a financial stake in the strike fund, perhaps a pension fund, and other funds to which he has contributed. Further, he is denied the right to participate in his union "government". Although the Union is required by the law to represent him impartially (citation omitted), he has no voice in how that representation is to be conducted. In addition, there are frequently social ramifications for a non-member working among members that cannot be overlooked.

We find, therefore, that Ivey's expulsion constituted unlawful coercion under Section 8(b)(1)(A), unless protected by the proviso thereto.[6]

We are unable to conclude that a reasonable reading of the proviso to Section 8(b)(1)(A) permits a valid distinction to be drawn between fines and expulsions meted out by a union to punish one of its members for filing charges with the Board. In *Local 283, UAW*

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[6]The proviso to Section 8(b)(1)(A) states as follows:

> Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

(*Wisconsin Motor Corporation),* 145 NLRB 1097, 1101-02, the Board specifically rejected a distinction between those two modes of union discipline suggested by the General Counsel and Member Leedom's dissent therein, in terms of the scope of the proviso. Thereafter, in *Skura,* the Board unanimously distinguished *Wisconsin Motor* in view of the public interest in protecting access of the Board's processes. What was said there is worthy of repetition, as those principles are equally applicable here:

> It is true that in *Wisconsin Motor* the Board held that the legislative history of Section 8(b)(1)(A) evidenced a Congressional intent not to extend the protective provisions of Section 8(b)(1)(A) to the imposition of a fine to compel compliance with internal union rules and policies and that the proviso to Section 8(b)(1)(A) immunizes a union from Board remedial action with respect to the enforcement of internal union rules by means other than job discrimination. There, unlike the instant case, the Board was dealing with a union rule which in the circumstances of that case did not run counter to other recognized public policies and, therefore, was not beyond the competence of the union to adopt and enforce. In that case, the Board was of the opinion that the Act did not vest it with the authority to police the internal discipline of the union short of job discrimination. By the rule under consideration here, however, Respondent attempted to regulate its members' access to the Board processes. Considering the overriding public interest involved, it is our opinion that no private organization should be permitted to prevent

> or regulate access to the Board, and a rule requiring exhaustion of internal union remedies by means of which a union seeks to prevent or limit access to the Board's processes is beyond the lawful competency of a labor organization to enforce by coercive means.[7]

It would seem self-evident that, if fines and expulsions are to receive equal treatment under the proviso, as held in *Wisconsin Motor,* and if a union fine imposed "to prevent or limit access to the Board's processes" is not protected by the proviso in view of the "overriding public interest involved", as held in *Skura,* expulsion from union membership which is imposed to prevent or limit such access similarly falls outside the protection of the proviso.

Our conclusion is fortified by the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Roberts v. N.L.R.B.,* 350 F. 2d 427, upholding the principles announced in *Skura* and the companion case of *Wellman-Lord Engineering, Inc.,* 148 NLRB 674. The Court, accepting the Board's critical distinction between strictly "internal union affairs" and union action designed to restrict access to the Board's processes, stated as follows (350 F. 2d at 429):

> In other words, by filing a charge with the Board in this case Martin stepped beyond the internal affairs of the Union and into the public domain. The Act, in enabling the Board to inhibit the Union from penalizing him for doing so keeps open the channels created by Congress for the administration of a public law and policy. This is not,

[7] *Skura, supra,* at 682.

> we agree with the Board, an inroad upon those internal union affairs left by the Act and its policy to be administered solely by the Union.[8]

It cannot be denied that, by filing his charges, Ivey "stepped beyond the internal affairs of the Union and into the public domain" just as did Martin in the *Roberts* case. And, when Respondent expelled him for doing so, it lost its immunity under the proviso just as did the Union in *Roberts,* for the proviso was never envisioned as extending to and shielding union conduct designed to frustrate the policies of an Act of Congress by obstructing the operations of the Federal agency entrusted by Congress with effectuation of those policies.

Finally, although the Supreme Court has yet to pass directly upon the scope of the Board's authority to protect access to its processes against union restraint or coercion, the policy statement of Mr. Justice Jackson, dissenting in *Trailmobile Co. v. Whirls,* 331 U.S. 40, 69, seems pertinent:

> The courts cannot tolerate the expulsion of a member of a union, depriving him of his right to earn a living merely because he invokes the process of the courts to protect his rights - even if he does so mistakenly. The Labor Relations Act makes it an unfair labor practice by an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony" in proceedings under it. Neither may a union use its own power over its members to bypass the courts. [citations omitted.]

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[8]See also in this regard, *Ryan v. International Brotherhood of Electrical Workers.* ..... F. 2d ..... (C.A. 7), (No. 15259, issued June 10, 1966).

Although the Court decided the case under another statute, the majority opinion indicated agreement with the above statement of Mr. Justice Jackson: ". . . if respondent has been unlawfully expelled, suspended, or otherwise dealt with by the union for asserting his legal rights, the law has provided remedies for such injuries. . . ." 331 U.S. at 50. It would appear that the above views are equally applicable to the National Labor Relations Act, for administrative agencies, too, have the necessary authority to protect the integrity of their own processes.

Respondent challenges the validity of the holding in *Skura, supra,* but urges alternatively that its action is lawful under the doctrine of *Tawas Tube Products, Inc.,* 151 NLRB No. 9. In *Tawas Tube,* the Board held that a decertification petition filed by union members was a matter of "legitimate union concern", that the filing of the petition constituted an attack upon "the very existence of the union as an institution", and that the union was acting in a "defensive" manner in disciplining the members for filing the petition. In those circumstances, the Board held that the policy grounds underlying the *Skura* decision were inapplicable and that a union could lawfully expel a member for filing such petition.[9]

The arguments of Respondent misconceive essential differences in cases arising under Sections 8 and 9, respectively, of the Act, and the Board's functions with respect thereto. Where a charge has been filed asserting infringement of statutory rights in violation of Section 8 of the Act, such charge relates to events

[9]See also *Pittsburgh-Des Moines Steel Company,* 154 NLRB No. 54, wherein the *Tawas Tube* doctrine was applied.

which have already occurred and sets in motion the Board's investigatory machinery to determine whether (1) the charge is meritorious and warrants formal proceedings, including an adversary hearing in which the issues are fully litigated, with the matter ultimately adjudicated by the Board on the basis of the record developed at the hearing, or (2) the charge lacks merit and should be dismissed. In either case, the resolution of the matter proceeds from an objective appraisal of fixed events preceding the filing of the charge, and the determination is made by a public agency, the Board, or, on appeal, the courts. At no stage of the proceeding is there occasion for influencing or persuading employees to support a particular disposition of the matter. Neither their subjective views concerning the events involved in the charge nor their solidarity with their fellow union members can have any legitimate effect on the outcome. The Board here is concerned, not with their views, choices, or mutual support, but with the vindication of the public interest in securing obedience to the statute. There is, therefore, no justification for permitting the public policy of the Act to be circumvented through the imposition of disciplinary action against an employee for having filed a charge with the Board. These considerations are applicable to all charges filed under Section 8, including the situation before us.

While proceedings under Section 9 of the Act are no less within the public domain, there are significant differences. Here, the Board is concerned with ascertaining the desires of the employees as to union representation. The matter of union representation is resolved, not through any appraisal by the Board of alleged past events, but rather by the employees them-

selves through their votes in a Board-conducted election. At all stages of Section 9 proceedings up to the election itself, the employees are subject, and properly so, to vigorous and persuasive campaigning by the employer, the union(s), and fellow employees. The outcome here is determined, not by past events already fixed, but by the influencing of employee views for the future event of their expression in the election. In the fluid rather than fixed circumstances of a contest for support, the union and its adherents can perform their legitimate function effectively only if they are unified. To require them to tolerate an active opponent within their ranks would undermine their collective action and thereby tend to distort the results of the election. To permit the union and its members to discipline the hostile members is therefore not inconsistent with the purposes of the Act and impinges on no legitimate interests of others, as we decided in *Tawes Tube*. On the other hand, for a union to penalize a member for filing a charge directly infringes upon the proper administration of the Act and therefore cannot be permitted, as we held in *Skura*.

Contrary to the assertions of the Respondent, therefore, we see no basis for applying the *Tawas Tube* rationale to the facts of the instant case. Moreover, the mere fact that Ivey filed, *inter alia*, an 8(a)(2) charge against his Employer is hardly sufficient to be considered an "attack [upon] the very existence of the union as an institution" as was found in *Tawas*.[10] At best, the filing of such a charge is a far more indirect attack upon a union than is a decertification petition. Nor do we believe it would effectuate the

[10]*Tawas Tube Products, Inc.*, Supra, at p. 3.

policies of the Act for the Board to attempt to distinguish between charges filed under different subsections of the Act, between different allegations under the same subsection, *e.g.*, assistance versus domination, or between meritorious charges and those lacking in merit. With respect to the last, it is worthy of note that the Court in *Roberts, supra,* afforded unions ample protection against a member's harassing conduct as a member, in those cases where it can be shown that the filing of frivolous charges is part of a pattern of harassment of the union.[11] Similarly, we reject the argument that Respondent's action in expelling Ivey was merely a proper attempt to protect the integrity of its collective-bargaining relationship with the cannery employers, thereby promoting industrial stability. Again, such an objective cannot be equated with the direct danger presented by a decertification petition, thus justifying an exception to the broad and valid policies announced by all Board members in *Skura* and adopted by the Court in *Roberts.*

For all of the foregoing reasons, we find that Respondent violated Section 8(b)(1)(A) by expelling Ivey from membership for filing unfair labor practice charges with the Board.

Conclusions of Law

1. Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

2. By expelling Thomas E. Ivey from membership because Ivey filed unfair labor practice charges with the Board or had failed to exhaust his internal union remedies prior to filing charges with the Board, Respondent

[11] 350 F. 2d at 430.

engaged in and was engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. The activities of Respondent found above to constitute unfair labor practices, occurring in connection with the operation of the companies involved herein, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and have led, and tend to lead, to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondent has engaged in unfair labor practices we shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It is essential, of course, that Ivey be reinstated to the full membership rights in Respondent which he would have enjoyed since August 27, 1962, the date on which he was unlawfully expelled from membership. Moreover, we shall order that he be reinstated upon his request, without requiring the payment of back dues to the union for the period of his expulsion, except for that portion of his dues which is shown at the compliance stage to be regularly allocable to the cost of insurance premiums, pension contributions, and other welfare benefits accruing to Respondent's members, to the extent they can be reinstated retroactively to the date of Ivey's expulsion; to the extent that benefits such as life insurance, health, and medical insurance and benefits and the like cannot be made effective retroactively

for Ivey, Respondent shall be required to reimburse Ivey with interest thereon at 6 percent per annum, for any expenses or losses suffered because of the absence of such benefits, less the proportion of Ivey's dues which would have been allocable to the payment of premiums for or other purchase of such benefits. To order the payment of all back dues for the period of expulsion would allow Respondent to be enriched by virtue of its unfair labor practices, for Ivey has been deprived of the right to vote in Union elections and for contract ratifications, to attend Union meeting, and otherwise to participate in the affairs of his Union. These rights cannot be replaced, and if Respondent has lost the revenue represented by his dues for the period in question, that loss flows directly from its own violation of the Act. On the other hand, if we were not to require the payment of that portion of Ivey's dues which support the cost of accrued benefits to which he is entitled, retroactively during the period of his expulsion, Ivey would receive a windfall to that extent. We conclude, therefore, that through such a limited payment of back dues, we can most effectively remedy the violation committed and restore the situation which would have existed but for that violation.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that the Respondent, Cannery Workers Union of the Pacific, affiliated with the Seafarers In-

ternational Union of North America, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Expelling employees from union membership, or otherwise disciplining them for filing unfair labor practice charges with the Board, or for failing to exhaust their internal union remedies prior to filing such charges with the Board, or otherwise participating or cooperating in Board proceedings.

(b) In any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon application, offer to Thomas E. Ivey immediate and full reinstatement to membership in Respondent without prejudice to any rights and privileges to which he would have become entitled as of, and since August 27, 1962, the date of his expulsion from membership, and reimburse him, together with 6 percent interest per annum, for any losses or expenses suffered because of the absence of certain benefits during the period of his expulsion, in accordance with the section of this Decision entitled "The Remedy".

(b) Post at its business offices and meeting halls in Los Angeles, California, copies of the attached notice marked "Appendix".[12] Copies of said notice, to be

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[12]In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order.

furnished by the Regional Director for Region 21, shall, after being duly signed by the Union's representative, be posted by the Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 21, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C. June 21, 1966.

Frank W. McCulloch, Chairman
John H. Fanning, Member
Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO ALL MEMBERS OF THE CANNERY WORKERS UNION OF THE PACIFIC, affiliated with the SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT expel employees from membership in our organization, or take other disciplinary

action against them, because they file unfair labor practice charges with the National Labor Relations Board, or otherwise participate or cooperate in the proceedings of the Board.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights under the National Labor Relations Act.

WE WILL offer to THOMAS E. IVEY, upon application, immediate and full reinstatement to membership in our organization without prejudice to any rights and privileges to which he may be entitled as of, and since, August 27, 1962, the date of his expulsion from membership, and reimburse him with 6 percent interest thereon, for any losses or expenses suffered because of the absence of certain benefits during the period of his expulsion, in the manner required by a Decision and Order of the National Labor Relations Board.

CANNERY WORKERS UNION OF THE PACIFIC, affiliated with the SEAFARERS INTERNATIONAL UNION OF AMERICA, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting; and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 849 South Broadway, Los Angeles, Calif. 90014, Tel. No. 688-5204, if they have any question concerning this notice or compliance with its provisions.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 751

CANNERY WORKERS UNION OF THE PACIFIC, AFFILIATED WITH THE SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 6) is reported at 396 F. 2d 955. The Board's decision and order (Pet. App. 12-29) are reported at 159 NLRB 843.

JURISDICTION

The judgment of the court of appeals (Pet. App. 7-9) was entered on August 22, 1968. The petition for a writ of certiorari was filed on November 18,

1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner Union violated Section 8(b)(1)(A) of the National Labor Relations Act by expelling an employee-member for having filed charges against the Union with the National Labor Relations Board without first exhausting his internal Union remedies.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth in Appendix A of the petition (pp. 1-5).

STATEMENT

Petitioner Union is the recognized bargaining representative of the packing employees in Southern California of Van Camp Sea Food Co., Inc. (R. 81; 10, 13, 67).[1] Thomas E. Ivey, a member of the Union since 1950, was employed by Van Camp, and was included in the unit represented by the Union (R. 81; 11, 14, 175). The Union's constitution and by-laws provide (R. 64):

> No member shall file any action in court or proceeding before any administrative agency against

[1] "R" refers to Vol. I of the record reproduced for the court below, which has been transmitted to this Court. The facts are undisputed, being based on the pleadings and a stipulation (R. 80).

> the Union * * * without having first invoked and exhausted the remedies provided by this Constitution and By-Laws * * * in conformity with this Section * * *. The foregoing requirement of exhaustion of remedies shall not be waived by the passage of time in any case except to the extent required by law.

In April 1962, Ivey filed unfair labor practice charges with the Regional Director of the National Labor Relations Board against the Union and against Van Camp and five other employers in the Southern California packing industry (R. 81; 3, 5, 67, 75). The charge against the Union alleged that it had violated its bargaining obligation under Section 8(b)(3) of the Act (Pet. App. 2) by agreeing to a new collective bargaining agreement with Van Camp and the other five employers six months in advance of the termination date of the existing agreement (R. 81; 5). The charge against the employers alleged that they had entered into the new collective bargaining agreement in order to influence an election of the Union's officials scheduled for May 1962, and to preclude a possibly different Union administration from negotiating a new collective bargaining agreement. That resulted, it was asserted, in assisting the Union in violation of Section 8(a)(2) of the Act (Pet. App. 1) and also in refusing to bargain in violation of Section 8(a)(5) (Pet. App. 2). It was further alleged that by "these and other acts the Employer [sic] has violated Section 8(a)(1) of the Act * * *" (R. 81; 3, 75). The Board's Regional Director refused to issue a complaint on the charges, and

Ivey did not appeal the matter to the Board's General Counsel (R. 81; 7, 67).

On June 12, 1962, members of the Union filed charges against Ivey with the Union administration, alleging that he had violated the Union's constitution and by-laws by: (1) filing the charge against the Union with the Board without first exhausting the internal remedies provided in the Union's constitution; (2) making an improper attempt to set aside a legal collective bargaining agreement of the Union by filing "false and unfounded * * * charges against the Union" with the Board; (3) interfering with and disrupting the established collective bargaining relationships between the Union and employees involved by filing "false and unfounded * * * charges" with the Board against both the Union and the employers; and (4) making false, defamatory and fraudulent statements concerning the Union and its collective bargaining activities (R. 81-82; 67-69). The Union served upon Ivey notice of the charges and of a scheduled hearing (R. 81-82; 69-70). Ivey did not appear at the hearing, and was tried *in absentia* (R. 81-82; 70-72). The Union's trial committee found him guilty of all charges, except (4) above, and recommended his expulsion from membership (R. 82; 74). At a subsequent meeting, the Union members adopted the recommendation and expelled Ivey (R. 82; 75). Ivey then filed the charge in the present proceeding with the Board, alleging that the Union had violated Section 8(b)(1)(A) of the Act by expelling him for filing the earlier charges, and a complaint issued (R. 80; 9, 10-11).

The Board, applying the principle first enunciated in *Local 138, Int'l Union of Operating Engineers (Charles S. Skura)*, 148 NLRB 679, determined that the Union violated Section 8(b)(1)(A) of the Act by expelling Ivey for filing unfair labor practice charges with the Board without having exhausted his intra-union remedies (Pet. App. 12-26). The Board ordered the Union to cease and desist from expelling members for filing charges with the Board; to reinstate Ivey to membership without loss of status; to reimburse him, with interest, for any expenses or losses suffered because of the absence of certain financial benefits during the period of expulsion; and to post appropriate notices (Pet. App. 26-30).

The court below, in a *per curiam* opinion, enforced the Board's order, on the authority of *National Labor Relations Board* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (Pet. App. 6).

ARGUMENT

The decision of the court of appeals is consistent with this Court's decision in *Shipbuilding Workers*, on which it relied, and does not conflict with any other decision. There is thus no occasion for further review.

1. In *Shipbuilding Workers*, this Court, approving the Board's *Skura* principle, held that the policy of keeping persons free from coercion against making complaints to the Board is so important in the functioning of the Act that a union violates Section 8(b)(1)(A) where it penalizes members for making such complaints without first exhausting internal union

remedies, "except and unless plainly internal affairs of the union are involved" (391 U.S. at 424).

Petitioner seeks to distinguish *Shipbuilding Workers* on the ground that, since the first charge there alleged that the union had caused job discrimination in violation of Section 8(b)(1)(A) and (2) of the Act, it was clear that the member was seeking to protect his Section 7 rights. Here, on the other hand, petitioner asserts, the matters complained of did not involve an alleged impairment of Ivey's Section 7 rights (Pet. App. 11-15). However, effectuation of the policies of the Act requires that an employee be as free of coercion in filing unfair labor practice charges relating to other sections of the Act as he is with respect to those involving Section 8(b)(1)(A) and (2). Moreover, although the charges filed by Ivey did not *in haec verba* allege that the Union had restrained or coerced him in the exercise of rights guaranteed by Section 7 of the Act, such an allegation was nonetheless implicit in his charges. Ivey in fact charged the employers and the Union with a scheme of illegal assistance and collusive bargaining, which resulted in saddling the employees with a contract which, absent such illegal action, their newly selected representatives might have rejected (*supra*, p. 3). It is settled that, where the employer and the union enter into a collective bargaining agreement in violation of Sections 8(a)(2) and 8(a)(5) of the Act, they interfere with the employees' Section 7 right to bargain collectively through representatives of their own choosing, or to refrain from such activity. *International Ladies'*

Garment Workers v. *National Labor Relations Board*, 366 U.S. 731, 737-738.[2]

2. Contrary to the Union's contention (Pet. App. 15-20) the decision of the court below does not conflict, "at least in principle," with *United Steelworkers of America (Richard C. Price)*, 154 NLRB 692, affirmed *sub nom. Price* v. *National Labor Relations Board*, 373 F. 2d 443 (C.A. 9), certiorari denied, 392 U.S. 904. In *Price*[3] the Board held that a union does not violate Section 8(b)(1)(A) of the Act by disciplining a member for filing with the Board a petition, under Section 9(c)(1)(A)(ii), to decertify his union as bargaining representative. As the Board explained here (Pet. App. 21-23), in the unfair labor practice charge situation the union is directly accused of having violated the Act, and it has no legitimate interest in blocking a prompt determination of its guilt or innocence of that charge by a public tribunal. In the decertification situation, on the other hand, no violation of the Act is directly involved, and to require the union to tolerate an active opponent within its ranks, who seeks to undermine its very existence, pre-

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[2] It should also be noted that here, as in *Shipbuilding Workers*, "a whole complex of public policy issues was raised by * * * [the member's] original charge. It implicated not only the union but the employer" (391 U.S. at 425). If Ivey had prevailed, a Board order would have been issued not only against the Union but also against the employers. The issues raised by Ivey's charges thus could not have been fully explored in an internal union proceeding, nor could such a proceeding have provided a remedy for the improper execution of the collective bargaining agreement charged by Ivey.

[3] See also *Tawas Tube Products, Inc.*, 151 NLRB 46.

sents a danger of disrupting the legitimate functioning of the union and of distorting the election results. The court below, which decided both *Price* and the instant case, agreed with the Board that the two situations are distinguishable (see 373 F. 2d at 447).

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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DECEMBER 1968

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